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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1946

No.

399

MRS. GEORGE C. WRIGHT, *et al.*,  
*Petitioners,*

*v.*

WILLIAM P. MITCHELL,  
*Respondent.*

**MEMORANDUM BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

↓  
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*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Respondent opposes the granting of a writ of certiorari in this case on the grounds that the decision of the Circuit Court of Appeals for the Fifth Circuit is correct, proper and consistent with prior decisions and precedents of this Court. Petitioners seek a review here of a judgment rendered upon the pleadings. The judgment of the Circuit Court of Appeals does not accomplish a final disposition of respondent's cause but merely decides that the amended complaint states a valid cause of action and provides grounds legally sufficient for a trial of the controversy to determine the actual merits of the case.

### Statement of the Case

Respondent, as plaintiff in the District Court of the United States for the Middle District of Alabama, filed his complaint against the defendant Board of Registrars, petitioners herein, seeking five thousand (\$5,000) dollars in damages, a permanent injunction against, and a judgment declaratory of, an alleged unconstitutional policy, custom and usage of the defendant Board of Registrars and their predecessors in office in subjecting Negroes to tests not required of whites, and in refusing to register qualified Negro electors, while at the same time registering white persons less qualified than Negro applicants, because of race or color.

Respondent, a colored person of African descent, duly meets all the requirements for registration and voting under the Constitution and laws of the United States and the State of Alabama.<sup>1</sup> He is a citizen of the United States and a bona fide resident of the State of Alabama. He is over 21 years of age. He is neither an idiot nor insane and has not been convicted of any felony or crime. He is a taxpayer of the State and paid taxes in full on real property with an evaluation in excess of three hundred (\$300.00) dollars prior to the time he offered to register. In short, respondent possesses all the qualifications and none of the disqualifications for registering and voting under the laws of the United States and of the State of Alabama (R. 5).

On July 5, 1945, respondent made due application to petitioners, the official registrars of voters of Macon County, for registration in order to be eligible to vote in

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<sup>1</sup> The Constitution of the United States, Article I, Sections 2 and 4, the 17th Amendment, and the Constitution of Alabama, Article VIII, Sections 177, 178, 181, 182, 186; Alabama Code of 1940, Section 32, Title 17.

future federal as well as state elections. Respondent was refused registration solely on account of his race or color after being required to answer questions and to produce two persons to vouch for him, while white persons were being registered forthwith without being subjected to such tests, all pursuant to a general, habitual and systematic discriminatory practice of petitioners (R. 6).

Respondent did not bring this cause of action because of the sole act of the petitioners in refusing him registration but instituted suit to contest the constitutionality of a policy, custom and usage established by petitioners' predecessors in office and maintained by them to prevent Negroes from registering and voting in the county of Macon. The core of respondent's amended complaint may be found in Paragraphs 6, 9, 10 and 11 thereof, where it is alleged:

"6.

Plaintiff, William P. Mitchell, is colored, a person of African descent and Negro blood, is over the age of twenty-one years. He is a taxpayer of the State of Alabama, and pays tax on real property with an assessed valuation in excess of Three Hundred Dollars. Plaintiff alleges that he is able to read and write any passage of the United States Constitution, that he has never been adjudged guilty of felony or any crime and that he is not an idiot or insane. Plaintiff further alleges that by reason of the allegation herein above made, he was in all particulars on the 5th day of July, 1945, and still is possessed of the qualifications of an elector and as such was and is entitled to be registered as such elector."

"9.

That defendants have established and are maintaining a policy custom and usage of denying to plaintiff and others on whose behalf this suit is

brought the equal protection of the laws by requiring them to submit to tests not required of white electors applying for registration and have continued the policy of refusing to register qualified Negro electors while at the same time registering white electors with less qualifications than those of Negro applicants solely because of race or color."

"10.

That on or about the 5th day of July, 1945, during the regular registration period while defendants, Mrs. George C. Wright and Virgil M. Guthrie, were acting as registrars of voters under the laws of Alabama in conducting the registration of persons qualified to register, plaintiff made application at the Macon County Court House, the place for registration of persons qualified to register, he filled out the regular form for registration, he produced two persons to vouch for him, as required by the board, he correctly answered such questions as were asked in proof of his qualifications, and was ready, willing and able to give any further information and evidence necessary to entitle him to be registered; that by reason of the said fact hereinbefore made, plaintiff was entitled to be registered as a voter. Plaintiff applied for registration in order to be eligible to vote in future federal as well as state elections."

"11.

Plaintiff further shows that during such registration period and on or about the 5th day of July, 1945, white persons presenting themselves for registration were not required to present persons to vouch for them, but were registered forthwith, whereas your petitioner solely because of his race and color was required to wait long hours before being permitted to file his application, was required to present persons to vouch for him, after which the said defendants denied plaintiff application and

wrongfully refused and illegally failed to register plaintiff on said July 5, 1945, solely on account of his race, color and previous condition of servitude. Plaintiff further states that it has become the general habitual and systematic practice of said Board of Registrars, including these defendants, Mrs. George C. Wright and Virgil M. Guthrie, and their predecessors in office to refuse to register Negro residents of Macon County, including the plaintiff, William P. Mitchell."

The cause was heard in the District Court upon a motion to dismiss the amended complaint on the ground that said complaint failed to state a cause of action. Upon the hearing of said motion, the District Court sustained petitioners' motion to dismiss and issued an order dismissing the complaint. From that order respondent appealed. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and remanded the cause.

### Questions Presented

**I. Where a Registrar or Board of Registrars of Voters, Pursuant to a Policy, Custom and Usage, Subjects Respondent and All Other Qualified Negro Applicants to Tests Not Required of White Applicants Who Apply for Registration in Order to Qualify to Vote in Forthcoming Federal and State Elections Can Relief Be Sought in the Federal Courts in the Form of a Class Action Seeking Declaratory Judgment and Injunction Restraining Such Registrar or Board of Registrars from Subjecting Negroes to Tests Not Required of White Applicants, Without First Exhausting Remedies Under State Law?**

**II. Does the Action of a Registrar or Board of Registrars of Voters, in Refusing to Register Respondent and Other Qualified Negro Applicants on Account of Race and Color, Amount to a Deprivation of the Rights Secured Under the Laws and Constitution of the United States, Namely Article I, Section 2, 14th, 15th and 17th Amendments to the Constitution, Subdivisions 11 and 14 of Section 41 of Title 28, Sections 31 and 43 of Title 8 of the United States Code.**

### **Summary of Argument**

#### **I**

**The Decision of the Circuit Court of Appeals That Failure to Pursue or Exhaust the Remedy Provided Under State Law in the Nature of a Conventional Judicial Proceeding Does Not Oust the Federal Courts of Jurisdiction Is Consistent with Precedents of This Court.**

#### **II**

**The Characterization of the Remedy Afforded Under Title 17, Section 35, Alabama Code of 1940, by the Circuit Court of Appeals as a Judicial Remedy Is Clearly Right.**

## ARGUMENT

### I

#### **The Decision of the Circuit Court of Appeals That Failure to Pursue or Exhaust the Remedy Provided Under State Law in the Nature of a Conventional Judicial Proceeding Does Not Oust the Federal Courts of Jurisdiction Is Consistent with Precedents of This Court.**

This Court has been careful to make a distinction between judicial and administrative remedies in determining whether the remedies in question need be exhausted before application can be made to federal courts for relief. When the remedy is administrative or legislative, the rule of this Court is that the state remedy must be pursued and completed before the aggrieved party can have any standing in the federal courts. *Natural Gas Pipeline Co. v. Slattery*,<sup>2</sup> *Porter v. Investors Syndicate*,<sup>3</sup> *Railroad & Warehouse Commission Co. v. Duluth Street R. Co.*,<sup>4</sup> *Henderson Water Company v. Corporation Commission*,<sup>5</sup> *Pacific Telephone & Telegraph Company v. Kuykendall*,<sup>6</sup> *Prentiss v. Atlantic Coastline Company*,<sup>7</sup> *United States v. Sing Tuck*.<sup>8</sup>

On the other hand, remedies provided under state law that are judicial in nature need not be invoked or pursued before an action can be maintained in the federal courts.

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<sup>2</sup> 302 U. S. 300.

<sup>3</sup> 286 U. S. 461; aff'd on rehearing, 287 U. S. 346.

<sup>4</sup> 273 U. S. 625.

<sup>5</sup> 269 U. S. 279.

<sup>6</sup> 265 U. S. 196.

<sup>7</sup> 211 U. S. 210.

<sup>8</sup> 194 U. S. 161.

*State Corporation Commission v. Wichita*; <sup>9</sup> *Porter v. Investors Syndicate, supra*; *Bacon v. Rutland R. Co.*; <sup>10</sup> *Lane v. Wilson*; <sup>11</sup> *Pacific Telephone & Telegraph Company v. Kuykendall, supra*.

Whenever the question has been presented, this Court has carefully examined the remedy provided to determine whether it was legislative or judicial in nature. *Prentiss v. Atlantic Coastline Co., supra*; *Lane v. Wilson, supra*; *Pacific Telephone & Telegraph Company v. Kuykendall, supra*; *Porter v. Investors Syndicate, supra*.

The Circuit Court of Appeals in applying the rule that judicial remedies need not be exhausted before application can be made to the federal courts was following a well-established rule of law consistently adhered to in the decisions of this Tribunal. There is, therefore, no basis or reason for this Court to review or examine the decision of the court below.

## II

### **The Characterization of the Remedy Afforded Under Title 17, Section 35, Alabama Code of 1940, by the Circuit Court of Appeals as a Judicial Remedy Is Clearly Right.**

Under Section 35, Title 17 of the Alabama Code of 1940, a right of appeal is provided when registration is denied. The pertinent provisions of the statute are set out below:

“Any person to whom registration is denied shall have the right to appeal, without giving security for

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<sup>9</sup> 290 U. S. 561.

<sup>10</sup> 232 U. S. 134.

<sup>11</sup> 307 U. S. 268.

costs, within thirty days after such denial, by filing a petition in the circuit Court or Court of like jurisdiction held for the county in which he or she seeks to register, to have his or her qualifications as an elector determined. Upon the filing of the petition, the clerk of the Court shall give notice thereof to the solicitor authorized to represent the state in said county, who shall appeal and defend against the petition on behalf of the state. Upon such trial the Court shall charge the jury only as to what constitutes the qualifications that entitle the applicant to become an elector at the time he or she applied for registration, and the jury shall determine the weight and effect of the evidence, and return a verdict. From the judgment rendered an appeal will lie to the supreme Court in favor of the petition to be taken within thirty days. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars."

The remedy therein provided is the type traditionally considered judicial. The aggrieved parties may go into a circuit court or court of like jurisdiction in the county in which he seeks to have his registration determined. Trial by jury is provided, and the court is required to charge the jury as to what constitutes the qualifications necessary for an applicant to become an elector at the time of his application for registration. The jury is required to determine the weight and effect of the evidence and return a verdict. From an adverse decision the aggrieved party may take an appeal to the Supreme Court of the State of Alabama.

Under this statute, the court has no initiatory functions. The proceedings must be commenced by the aggrieved person who contests the decision of the Board of Registrars. Normally administrative agencies are not so circumscribed but have the authority to commence a hearing on their own application, to call parties before them and

to make a determination of the issues involved. *Prentiss v. Atlantic Coastline Co., supra*. A court merely has the authority to declare and enforce liabilities, rights and duties as they exist on present or past facts and under a rule of law already operative. Legislative functions, on the contrary, have an element of futurity and generality which is not characteristic of judicial inquiries. *Prentiss v. Atlantic Coastline Company, supra*.

The remedy provided herein is similar in nature to that provided under the Oklahoma statute in the case of *Lane v. Wilson, supra*, which this Court characterized as judicial.<sup>12</sup> The Circuit Court of Appeals has gone thoroughly into this phase of the proceedings. A substantial portion of the majority opinion and the entire concurring opinion are devoted to a careful analysis of the state remedy provided and to a determination of its classification as administrative or judicial. In deciding that it was a judicial remedy, the Circuit Court of Appeals was merely following the rules and the yardstick which this Court has consistently used in making such determination in previous decisions.

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<sup>12</sup> The Oklahoma Statute (26 Okla. Stat. Sec. 74) provided in part: "and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said Court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a (give an) expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases. \* \* \*"

### ***Conclusion.***

The decision of the Circuit Court of Appeals is neither ambiguous nor confused. It in essence holds that the complaint states a cause of action and that federal courts have jurisdiction to grant the relief applied for upon proof that such relief is warranted according to the facts and evidence adduced in a trial on the merits. Under these circumstances, the public interest and the interest of the litigators will be best served by refusing to grant the writ of certiorari as prayed for by petitioners and by allowing a complete adjudication of all the issues involved in this litigation in a trial on the merits as ordered by the Circuit Court of Appeals.

WHEREFORE, for the reasons hereinabove advanced, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ROBERT L. CARTER,  
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